The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Department of Labor - First 40-hour Workweek Employees - 10-hour Per Diem Rule

File: B-229473

Date: October 7, 1988

DIGEST

The Department of Labor is correct in applying Federal Travel Regulations para. 1-7.5b(1)(b), which prohibits per diem payments to employees who work a non-standard workday unless the travel period is at least 2 hours longer than the employees' workday, to mine inspectors who work a "first 40-hour workweek." The regulation is intended to be applied to variable or flexible workdays regardless of the number of hours worked, or whether scheduled or nonscheduled, as well as to compressed workday schedules. Since in this case the employees' travel from the time they leave home or office until they return is hours of employment for which they receive regular, overtime, or premium pay depending on the specific situation, any expenses they incur during travel on short or long days are expenses employees would normally incur, would seem to average out over a number of days, and are not necessarily incident to the travel status.

DECISION

This is in response to a request from the Department of Labor (Labor) in conjunction with the National Council of Field Labor Locals (NCFLL), under our procedures in 4 C.F.R. part 22 (1988), for an opinion concerning the application of a regulation governing per diem for travel of less than 24 hours without lodging to employees who work a "first 40-hour workweek." For the reasons stated below, we find that Labor is correct in applying this regulation to these employees.

BACKGROUND

In this case, the employees working a first 40-hour workweek are mine inspectors for the Mine Safety and Health Administration (MSHA). The concept of a first 40-hour workweek is that for employees for whom a regular schedule

of duty is impracticable, the first 40 hours in a workweek is considered regularly scheduled work for purposes of premium pay and hours of duty. 5 C.F.R. § 610.111(b) (1988). These MSHA inspectors frequently work a variable schedule which may be truncated into three or four calendar days, thereby changing the normal pattern of personal costs relating to employment, e.g., meals and commuting expenses.

The regulations governing per diem for travel of 24 hours or less prohibit the payment of per diem for travel of 10 hours or less but authorize per diem for travel of more than 10 hours. Federal Travel Regulations (FTR), para. 1-7.5b(1)(a), (c).1/ However, there is an exception to this "10-hour rule" contained in FTR, para. 1-7.5b(1)(b), which provides as follows:

> "(b) Exception to 10-hour rule. Per diem shall not be allowed for employees who qualify for per diem solely on the basis of working a non-standard workday (e.g., four 10-hours days or other compressed or flexible schedule). In such instances, per diem shall not be allowed for travel periods less than or equal to the employee's workday hours plus 2 hours."

Labor has applied this provision to the MSHA mine inspectors working a first 40-hour workweek which, in effect, means that these employees are rarely eligible for per diem payments incident to travel of 24 hours or less. Labor contends that it would be inequitable to other employees working similar hours in an office or on other schedules in a travel status to reimburse first 40-hour employees for dinners, snacks, etc., without taking into consideration the fact that first 40-hour employees do not always incur the luncheon, coffee break or commuting expenses incurred by employees who work 8 hours a day, 5 days a week. Thus, Labor maintains that any expenses incurred by a first 40-hour employee are expenses that such an employee would normally expect to incur.

Labor further contends that the fact that an employee works inconvenient hours and incurs higher expenses (e.g., eating dinners out during an evening shift rather than buying lunches during a day shift) should not be a factor in determining entitlement to per diem. Labor notes that MSHA mine inspectors are given premium pay of 10 percent for any

---

1/ Supp. 24, July 6, 1987, incorp. by ref., 41 C.F.R. § 101-7.003 (1987).

of the first 40 hours worked between 6 p.m. and 6 a.m. and 25 percent for Sunday hours.

The NCFLL asserts that Labor is incorrect in applying FTR, para. 1-7.5b(1)(b), to the mine inspectors because a "first 40-hour workweek" does not constitute a compressed or flexible schedule as referenced in the regulation and is not a scheduled tour of duty which can be predetermined.

We requested and received comments from the General Services Administration (GSA) since that agency has been delegated the authority for prescribing the Federal Travel Regulations. 5 U.S.C. § 5707(a)(1) (Supp. IV 1986). In its response, GSA concludes that Labor is correct in its interpretation and application of FTR, para. 1-7.5b(1)(b), to 40-hour workweek employees.

The response from GSA first notes that this exception to the 10-hour rule was initially implemented in Supplement 20, May 30, 1986, to preclude eligibility for per diem payments based solely on the number of hours in an employee's workday. The GSA states that inherent in the 10-hour rule and its exception is the assumption that, as long as the employee's travel period consumes no more than the employee's normal workday plus 2 hours, no additional expenses will be incurred because of the travel status.

However, GSA found that agencies tended to misinterpret the illustrative examples included in the 1986 change, even though the examples were not all inclusive, and agencies often restricted application of the exception to employees working a scheduled 10-hour workday. Because of numerous inquiries about the application of the provision to non-scheduled or variable workdays, the rule was amended in Supplement 24, July 15, 1987, to clarify that it was intended to be all encompassing; that is, GSA states it is intended to be applied to variable or flexible workdays regardless of the number of hours worked, whether scheduled or non-scheduled, as well as to compressed workday schedules.

Regarding the specific circumstances of this case, GSA concludes that even though the inspectors are required to travel to perform their duties at the mine sites, that travel is part of their normal workday and appears to be inherent in the job. The GSA does not believe such travel can be properly compared to the travel of employees working fixed or scheduled workdays as a basis for determining whether additional expenses are incurred incident to the travel status.

OPINION

The statutory authority for the payment of per diem allowances is contained in 5 U.S.C. § 5702 (Supp. IV 1986) and provides, in pertinent part, that "an employee while traveling on official business away from his designated post of duty . . . is entitled to . . . a per diem allowance . . . ." The implementing regulations, Federal Travel Regulations, provide at paragraph 1-7.1a (Supp. 20, May 30, 1986), that "per diem allowances . . . shall be paid for official travel." Thus, federal employees have a basic statutory entitlement to be paid per diem allowances while traveling on official business away from their official duty stations. Mason E. Richwine, B-224811, Sept. 25, 1987; Jack C. Smith, et al., 63 Comp. Gen. 594 (1984).

At the same time, paragraph 1-7.1e of the FTR states that it is the responsibility of the agency to authorize only such per diem allowances as are justified by the circumstances affecting the travel. Therefore, we have held that it is within the discretion of the agency to pay per diem only where it is necessary to cover the increased expenses incurred arising from the performance of official duty. See Savings & Loan Examiners, B-198008, Sept. 17, 1980, and cases cited. For example, in Savings & Loan Examiners, we upheld the Federal Home Loan Bank Board's establishment of different per diem policies for field and headquarters employees traveling less than 24 hours. We noted that agencies, in fixing per diem policy, should consider factors which will reduce the expenses of an employee, such as familiarity with a locality as developed through repeated travel. After consideration of such factors, we held that it is within the discretion of the Board to limit per diem reimbursement for field examiners. See also Gilbert C. Morgan, 55 Comp. Gen. 1323 (1976).

Furthermore, as a general rule, agencies charged with the statutory responsibility of administering a government program are accorded great deference with respect to the promulgation and interpretation of regulations implementing the program. Ordinarily, regulations are deemed to be within an agency's statutory authority and consistent with congressional intent unless shown to be arbitrary or inconsistent with the statutory purpose. Colonel William J. Jackomis, 58 Comp. Gen. 635 (1979).

In this case, both GSA and Labor have determined that FTR, para. 1-7.5b(1)(b), applies to the MSHA mine inspectors who work a first 40-hour workweek. We see no reason to disagree with this determination.

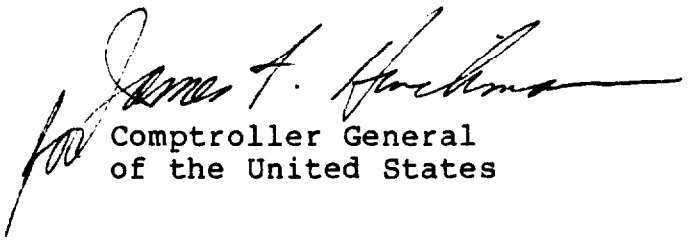
The intention of the "10-hour rule" regulation was to provide a rule-of-thumb to determine when an employee traveling less than 24 hours incurs expenses beyond the expenses normally incurred during a workday for which the employee is expected to pay. Employees who work non-standard workdays and have flexible schedules may incur different "normal" expenses than those who work a standard 9-to-5 workday. Thus, it is more difficult to determine what the normal expenses for such employees would be in order to determine when per diem would be allowed. We believe that GSA's approach in FTR, para. 1-7.5b(1)(b), is an appropriate method by which to determine if per diem should be allowed in those circumstances.

Further, it is reasonable to apply the regulations to employees who work a first 40-hour schedule since, by definition, such employees work a "non-standard workday." See 5 C.F.R. § 610.111(b) (1988). The examples given in the regulation were clearly not meant to be all inclusive.

Finally, regarding the fact that under this interpretation of the regulation 40-hour workweek employees would rarely be eligible for per diem payments, we do not believe that this creates an inequitable situation. From the examples contained in the record, it appears that while on some days such employees may need to buy dinner while in travel status, on other days the employee may actually reduce personal expenses associated with work by being on duty for considerably less than an 8-hour period. Thus, it is reasonable to assume that any expenses incurred by a first 40-hour employee are expenses that such an employee would normally expect to incur since they seem to average out over a number of days and are not necessarily incident to the travel status. We also agree that an employee's work schedule should not, in and of itself, confer any special presumption that extra personal expenses are incurred.

Moreover, in this case, the employees' travel from the time they leave home or office until they return is considered hours of employment for which they receive regular, overtime, night differential or premium pay, depending on the situation.

Accordingly, we conclude that Labor is correct in applying FTR, para. 1-7.5b(1)(b), to its employees on a first 40-hour workweek schedule for purposes of determining if per diem may be allowed.



for Comptroller General
of the United States